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## India's Removal of Kashmir's Special Protection Status: an Internationally Wrongful Act?

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## INDIA'S REMOVAL OF KASHMIR'S SPECIAL PROTECTION STATUS: AN INTERNATIONALLY WRONGFUL ACT?

*By Gita Howard\**

### ABSTRACT

*India abrogated Articles 370 and 35A of its Constitution in August of 2019, effectively removing Kashmir's longstanding special protection status. Kashmir's special protection status provided Kashmiris with an additional degree of autonomy than India's states, and its revocation left Kashmir under greater control of Delhi.<sup>1</sup> Several organizations flagged human rights concerns regarding the sudden revocation of the region's special protection status and the subsequent lockdown. This article seeks to narrowly address whether the removal of Kashmir's special protection status was a violation of international law. This article demonstrates that although Kashmiris' internal right to self-determination may serve as a theory for illegality under International law, the right to self-determination must be balanced against India's national security interests and duty to protect. Thus, India's removal of Kashmir's special protection status was likely an internationally lawful act.*

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<sup>1</sup> Delhi refers to the capital of India, the seat of the Indian Government.

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I. INTRODUCTION: A BRIEF HISTORY OF RELATIONS BETWEEN INDIA, PAKISTAN, AND KASHMIR

A. THE REGION OF KASHMIR PRIOR TO THE INDIA-PAKISTAN PARTITION

To examine whether India's revocation of Kashmir's special protection status was in breach of international law, it is necessary to detail the long and complex history of Jammu and Kashmir (interchangeably referred to as "Kashmir" or "J&K"). Today, Kashmir is situated in the northern region of the Indian subcontinent, bound in the northeast by the Uygur region of Xinjiang, to the east by Tibet and the Chinese-administered portions of Kashmir, to the south by Indian

states, to the southwest by Pakistan, and to the northwest by the Pakistani-administered portion of Kashmir.<sup>2</sup>

Before the India-Pakistan partition of 1947, Kashmiris enjoyed relative religious and cultural harmony.<sup>3</sup> In fact, local leaders described the community as *kashmiriyat*, a term which translates to “Kashmir amity,” to explain the peaceful and amicable relations between faiths and cultures in the region.<sup>4</sup> Despite religious diversity – Islamism, Buddhism, and Hinduism – the shared Kashmiri identity was strong, as evidenced by the frequent blending of religious practices across faith lines.<sup>5</sup> According to the 1941 Census, Muslims formed 72.41 percent of the population, while Hindus formed 25.01 percent of the population in the region.<sup>6</sup> According to a 2013 report from the Berkeley Center, the Kashmir Valley population was 95 percent Muslim, the Jammu region was 67 percent Hindu, and the Ladakh region was Tibetan Buddhist majority at 50 percent.<sup>7</sup>

In the early nineteenth century, the British assumed colonial rule over the Indian subcontinent, including the Kashmir region.<sup>8</sup> Once Britain assumed control over India, Britain categorized Kashmir as a “princely state,” or one of the autonomous regions that spanned the Indian subcontinent,<sup>9</sup> and granted it quasi-autonomy.<sup>10</sup> Notably, in the 1930s, parallel with the Indian independence movement, Kashmiris initiated a “Free Kashmir” movement for independence

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<sup>2</sup> Rais Akhtar, *Jammu and Kashmir*, BRITANNICA, <https://www.britannica.com/place/Jammu-and-Kashmir> (last visited Mar. 7, 2021).

<sup>3</sup> See BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., GEO. UNIV., KASHMIR: RELIGIOUS DIVERSITY BECOMES RELIGIOUS MILITANCY 6 (2013).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Fahad Nabeel, *Altering Demographics of Indian-Held Kashmir*, CENTRE FOR STRATEGIC AND CONTEMPORARY RESEARCH, (Jan. 17, 2017), <https://cscr.pk/explore/themes/politics-governance/altering-demographics-indian-held-kashmir/>.

<sup>7</sup> BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3.

<sup>8</sup> Mehdi Zakerian & Negin Sobhani, *International Humanitarian Laws and Laws of War: Kashmir*, 3 INT’L STUD. J. 1, 4 (2006).

<sup>9</sup> Angma D. Jhala, *The Indian Princely States and Their Rulers*, OXFORD RESEARCH ENCYCLOPEDIAS, <https://oxfordre.com/asianhistory/view/10.1093/acrefore/9780190277727.001.0001/acrefore-9780190277727-e-355>.

<sup>10</sup> Zakerian & Sobhani, *supra* note 8, at 4.

from the British regime.<sup>11</sup> As the end of World War II and British decolonization loomed, Britain passed the Indian Independence Act.<sup>12</sup>

Although the British and Indian National Congress advocated for a secular and pluralistic democracy, the All-India Muslim League, a political group founded in 1906 to ensure the rights of Indian Muslims,<sup>13</sup> ascribed to a two-nation theory which supported dividing the region into two nations based on religion—Hindus in India and Muslims in Pakistan.<sup>14</sup> Central to this proposition was the fear that Muslims could not adequately have their interests supported in a majority Hindu state.<sup>15</sup> However, some scholars highlight that many Muslims in what became West Pakistan were not in favor of the two nation theory.<sup>16</sup>

#### B. KASHMIR DURING THE INDIA-PAKISTAN PARTITION

During partition, Kashmir was placed into a particularly difficult predicament. When British rule concluded, the unofficial stance was that each state was to decide whether to accede to India or to Pakistan.<sup>17</sup> Initially, the then-leader of Kashmir, Maharaja Hari Singh, held off on making a decision and joined neither India nor Pakistan.<sup>18</sup> Pakistan opposed Singh's hold out and viewed it as illogical because Kashmir was a majority-Muslim state.<sup>19</sup> Meanwhile, India had an interest in obtaining the Kashmir territory because it was an important strategic barrier between Pakistan and India.<sup>20</sup> Furthermore, India had concerns about the Hindu-majority parts of Kashmir.<sup>21</sup> Regardless of both states' individual stakes in the Kashmir

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> BRITANNICA, *Muslim League*, <https://www.britannica.com/topic/Muslim-League> (last visited Mar. 13, 2021).

<sup>14</sup> Zakerian & Sobhani, *supra* note 8, at 4-5.

<sup>15</sup> Christine Fair, *False Equivalency in the "Indo-Pakistan" Dispute*, WAR ON THE ROCKS (June 16, 2015), <https://warontherocks.com/2015/06/false-equivalency-in-the-indo-pakistan-dispute/>.

<sup>16</sup> *See id.*

<sup>17</sup> Zakerian & Sobhani, *supra* note 8, at 5.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

territory, Singh requested a standstill agreement with both India and Pakistan, writing two telegrams to India and Pakistan.”<sup>22</sup> Pakistan telegraphed back to express assent to the standstill agreement.<sup>23</sup>

In response, India requested additional discussions before signing the standstill agreement, stating that the “Government of India would be glad if you or some other Minister duly authorized in this behalf could fly to Delhi for negotiating [the] Standstill Agreement between [the] Kashmir Government and Indian dominion,” but no representative went to Delhi or concluded an agreement.<sup>24</sup>

In October of 1947, Pakistani militias from tribal areas mobilized to invade Kashmir, triggering the beginning of the enduring Kashmir conflict and a series of three Indo-Pakistan wars.<sup>25</sup> Regular Pakistani military personnel also accompanied the tribesmen during the invasion.<sup>26</sup> There is a debate as to whether this invasion constitutes a violation of the aforementioned standstill agreement, as Pakistan does not take ownership for the invasion – however, research indicates that Pakistan gave national and provincial support to these tribesmen invaders.<sup>27</sup> As the tribal invaders made their way to Srinagar, the largest city in Kashmir, and Singh requested India’s assistance to fend off the invasion,<sup>28</sup> India agreed to defend Kashmir if in turn, Kashmir agreed to accede to India.<sup>29</sup> Singh signed an instrument of accession on October 26, 1947, accompanied with a letter detailing his intentions behind the accession to the then-Governor-General of India, Lord Mountbatten.<sup>30</sup> The Instrument of Accession provided:

I hereby declare that I accede to the Dominion of India . . . I hereby declare that I execute this Instrument on behalf of this State and

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<sup>22</sup> Surendra Chopra, *Kashmir in the United Nations*, 25 THE INDIAN J. OF POL. SCI. 124, 126 (1964).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Zakerian & Sobhani, *supra* note 8, at 5; *see also* Fair, *supra* note 15.

<sup>26</sup> Husain Haqqani, *Pakistan’s Endgame in Kashmir*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (July 1, 2003). <https://carnegieendowment.org/publications/index.cfm?fa=view&id=1427>.

<sup>27</sup> Fair, *supra* note 15.

<sup>28</sup> *Id.*

<sup>29</sup> Zakerian & Sobhani, *supra* note 8, at 6.

<sup>30</sup> *Id.*

that any reference in this Instrument to me or to the Ruler of this State is to be construed as including a reference to my heirs and successors.<sup>31</sup>

The instrument of accession, while granting Jammu and Kashmir autonomy in its own internal and local affairs, further allocated several aspects of governance to India, including military defense, external affairs, and communications.<sup>32</sup> However, Pakistan has questioned the existence of this instrument because debate exists about when the signed instrument of accession reached New Delhi.<sup>33</sup>

Lord Mountbatten's response to Singh's letter, dated October 27, 1947, calls into question whether the correct procedures were followed after the accession. The letter stated:

My Government has decided to accept the accession of Kashmir State to the Dominion of India. Consistently with their policy that, in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State. It is my Government's wish that as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of the State's accession should be settled by a reference to the people.<sup>34</sup>

From Kashmir's accession to India onward, Pakistan has argued that India is holding Kashmiri Muslims captive and disputed the accession, while India has contended that Singh's accession to India was achieved through partition, an internationally agreed upon practice.<sup>35</sup> During this first Indo-Pakistan war, Pakistan acquired one third of Kashmir's territory, and India retained the remaining land.<sup>36</sup>

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<sup>31</sup> INSTRUMENT OF ACCESSION OF JAMMU AND KASHMIR, (1947), [http://jklaw.nic.in/instrument\\_of\\_accession\\_of\\_jammu\\_and\\_kashmir\\_state.pdf](http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> Christine, *supra* note 15.

<sup>34</sup> Zakerian & Sobhani, *supra* note 8, at 6-7.

<sup>35</sup> BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3, at 5.

<sup>36</sup> Fair, *supra* note 15. Pakistan ceded a portion of Kashmir to China as part of a border agreement, and China occupied a part of Indian Kashmir during the 1962 Indo-China War. *Factbox – India, China's old border dispute*, REUTERS (Nov. 8, 2009), <https://www.reuters.com/article/idINIndia-43780820091108>.

## C. THE UN SECURITY COUNCIL RESOLUTION 47

At this point of the conflict, India took the Kashmir query to the United Nations ("UN"), which resulted in the UN Security Council Resolution 47 of 1948 ("Security Council Resolution 47").<sup>37</sup> The Security Council Resolution 47 called for a plebiscite in order to establish the will of the Kashmiri people.<sup>38</sup> No plebiscite has since been held—a fact that Pakistan often highlights in discussions surrounding the Kashmir dispute.<sup>39</sup> However, a lesser known fact is that the UN set forth conditions before the plebiscite could be held—conditions that Pakistan never fulfilled.<sup>40</sup> The UN mandated that first, Pakistan should withdraw its forces:

The Government of Pakistan should . . . secure withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the state for the purpose of fighting, and to prevent any intrusion into the State of such elements and any furnishing of material aid to those fighting in the State . . . .<sup>41</sup>

Second, the resolution determined that once Pakistan withdrew its forces, India should withdraw its own forces, "[w]hen it is established . . . that the tribesmen are withdrawing and that arrangements for the cessation of the fighting have become effective, put into operation . . . a plan for withdrawing their own forces from Jammu and Kashmir..."<sup>42</sup> And thirdly, once the two prior conditions were met, the resolution established that the Government of India should issue a plebiscite.<sup>43</sup>

Consequentially, though it is often mentioned that India never issued a plebiscite to determine the will of the Kashmiri people under the Security Council Resolution, it is rarely explained that Pakistan failed to meet the first prerequisite under the resolution, a necessary

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<sup>37</sup> See Security Council Res. 47, U.N. Doc. S/RES/47 (1948) [hereinafter S.C. Res. 47].

<sup>38</sup> See *id.*; see also Fair, *supra* note 15. As discussed earlier, this plebiscite was first established by Lord Mountbatten, and then carried on by the UN.

<sup>39</sup> Fair, *supra* note 15.

<sup>40</sup> *Id.*

<sup>41</sup> S.C. Res. 47, *supra* note 37, at 4.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> *Id.* at 5-6.



condition for the plebiscite—the withdrawal of Pakistani forces from Kashmir.<sup>44</sup> In 1956, Indian Prime Minister Jawaharlal Nehru offered the Pakistani Prime Minister, Mohammed Ali Bogra, a plebiscite for the whole of Kashmir, but Pakistan ultimately rejected the offer.<sup>45</sup> Furthermore, to this day, Pakistan has never withdrawn its forces—a fact that is often overlooked by the world media, governments, and human rights organizations.<sup>46</sup> Moreover, it is arguable whether the plebiscite is relevant today, as the demographics in Kashmir have altered dramatically as a result of ensuing conflict.<sup>47</sup>

#### D. INTEGRATING KASHMIR INTO INDIA'S LEGAL FRAMEWORK

After Security Council Resolution 47 was issued in 1948, India implemented legislation to legalize the status of Kashmir within its national framework. In 1952, India formed an agreement with Kashmir, known as the Delhi Agreement, which provided, “that sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the state,” and further affirmed the State’s authority to establish permanent residents’ rights and privileges.<sup>48</sup> To give effect to the Delhi Agreement, India enacted Articles 370 and 35A of the Constitution.<sup>49</sup>

Articles 370 and 35A of the Indian Constitution granted the region its special protection status. Article 370 came into effect in 1949 exempting Kashmir from the Indian Constitution with exception to

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<sup>44</sup> See *id.*; see also Fair, *supra* note 15.

<sup>45</sup> Political turmoil during this period, as well as pressure from militant and aspiring leader, Ayub Khan, contributed to this decision. See Zakerian & Sobhani, *supra* note 8.

<sup>46</sup> See Aarti Tikoo, *Pak-sponsored terror in Kashmir ‘ignored and overlooked’ by human rights activists: TOI journalist at US Congressional hearing*, TIMES OF INDIA (Oct. 22, 2019), <https://timesofindia.indiatimes.com/india/pak-sponsored-terror-in-kashmir-ignored-and-overlooked-by-human-right-activists-toi-journalist-at-us-congressional-hearing/articleshow/71714515.cms>.

<sup>47</sup> See INDIA TODAY, *Kashmir: Curious case of demographic realities and perceptions* (Aug. 19, 2019), <https://www.indiatoday.in/news-analysis/story/kashmir-curious-case-of-demographic-realities-and-perceptions-1582376-2019-08-19>.

<sup>48</sup> See L. Ali Khan, *India Complicated the Kashmir Dispute*, JURIST (Aug. 30, 2019), <https://www.jurist.org/commentary/2019/08/l-ali-khan-india-kashmir-dispute/>.

<sup>49</sup> *Id.*

modifications made by the president and presidential order,<sup>50</sup> and granted Kashmir the jurisdiction to create its own laws, aside from laws specified in the Instrument of Accession relating to finance, defense, foreign affairs, and communications.<sup>51</sup> Article 370 also established a separate Kashmir constitution and flag and denied property rights to non-residents of the region.<sup>52</sup> In 1954, Article 35A, also known as “the Permanent Residents Law,”<sup>53</sup> allocated power to the Kashmir legislative assembly to determine who may be a permanent resident of the region, and granted particular special rights and privileges to Kashmir citizens relating to property, public aid, and welfare programs, as well as public sector jobs.<sup>54</sup> Because Article 35A permitted Kashmir to define permanent residents and determine their rights, the J&K legislature was also able to limit women’s property rights, such that once women married outside nonpermanent residents, they lost their permanent resident rights to inherit or own property.<sup>55</sup> Moreover, some caste communities that came to Kashmir as migrant laborers have also been discriminated against under Articles 370 and 35A, and have been unable to benefit from welfare programs and opportunities.<sup>56</sup> Thus, some have criticized Articles 370 and 35A because of their discriminatory impact.<sup>57</sup>

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<sup>50</sup> Tariq Ahmad, *FALQs: Article 370 and the Removal and Kashmir’s Special Status*, L. LIBR. OF CONG. (Oct. 3, 2019), <https://blogs.loc.gov/law/2019/10/falqs-article-370-and-the-removal-of-jammu-and-kashmirs-special-status/>.

<sup>51</sup> *Kashmir special protection status explained: What are Articles 370 and 35A?*, ALJAZEERA (Aug. 5, 2019), <https://www.aljazeera.com/news/2019/08/kashmir-special-status-explained-articles-370-35a-190805054643431.html>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Office of the United Nations High Commissioner for Human Rights, *Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019*, (July 8, 2019), at para. 54.

<sup>55</sup> Akanksha Khullar, *Women’s Rights and the Jammu and Kashmir Reorganisation Act, 2019*, INST. OF PEACE & CONFLICT STUD. (Dec. 24, 2019), [http://www.ipcs.org/comm\\_select.php?articleNo=5639](http://www.ipcs.org/comm_select.php?articleNo=5639).

<sup>56</sup> See Pallavi Sareen, *The Constitution is Allowing the Continued Discrimination of Valmikis in J&K*, THE WIRE (June 28, 2019), <https://thewire.in/rights/jammu-and-kashmir-article-35a-valmikis>.

<sup>57</sup> Khullar, *supra* note 55.

## E. ENDURING CONFLICT IN KASHMIR

Despite the implementation of Articles 370 and 35A, conflict over Kashmir still persisted. Pakistan waged a second war against India over Kashmir from April to September of 1965, where Indian forces defeated Pakistan.<sup>58</sup> Since the conclusion of this second war, India and Pakistan have steadier control over locations with a military advantage—India holds the Kashmir Valley, Jammu, and Ladakh regions, whereas Pakistan has maintained control over the Azad Kashmir region as well as Gilgit-Baltistan.<sup>59</sup> In 1999, a third war ensued over Kashmir, also referred to as the Kargil Conflict.<sup>60</sup> There, Pakistani military units infiltrated the Kargil region, but were ultimately deterred by Indian troops and international pressure.<sup>61</sup> Religious tensions fueled much of the most recent war with Pakistan leaders resisting the secularization of society through the implementation of a national Islamization program in Pakistan, and an increasing popularity of Hindu nationalists within the Bharatiya Janata Party (“BJP”), a right wing political party which has historically reflected Hindu nationalist ideology.<sup>62</sup>

Militant activity has greatly contributed to instability in the Kashmir region. In response to disputed elections and general failures of Indian governance in 1989, Pakistani militants initiated an insurgency against Indian forces across the line of control.<sup>63</sup> The Indian Government responded with “harsh counterinsurgency operations that further alienate[d] much of the Muslim population of the Kashmir Valley.”<sup>64</sup> Militant attacks on Indian forces as well as civilians caused a major exodus of Hindu Pandits, a Brahmin caste that was a privileged minority prior to partition.<sup>65</sup> Although numbers vary, it is

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<sup>58</sup> See Fair, *supra* note 15; see also BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3, at 9.

<sup>59</sup> BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3, at 9.

<sup>60</sup> *Id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 5.

<sup>63</sup> See *id.* at 9.

<sup>64</sup> See *id.*

<sup>65</sup> The Hindu pandits had made up the majority of Hindus in Kashmir until the conflict in 1989—since then many have been killed and many have fled sectarian violence. See BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3, at 9.

estimated that 350,000 Pandits were forced to flee their homes following threats from Islamist militants in the valley.<sup>66</sup> Some figures estimate that today, 200,000 to 300,000 Pandits are living in exile as a result of targeted killings to ethnically cleanse Pandits from the region.<sup>67</sup> Militant activity has been fueled in large part by Pakistan, as it has been verified that Pakistan has provided arms to militants who train on their side of the line of control.<sup>68</sup> However, some have also speculated that India has supported Baloch and Sindhi nationalists who sought independence from Pakistan, although those allegations remain unverified.<sup>69</sup> Regardless of who is to blame for militant activity, a staggering amount of violence has been committed by militant groups in Kashmir—it has been reported that anywhere from 30,000 to 100,000 civilians have been killed.<sup>70</sup>

Unique geopolitical and religious factors have only fueled tensions post-partition. The rise of violence in the Kashmir region can be attributed to several factors including the strong presence of Indian military forces, and Islamic militant violence.<sup>71</sup> Jihadists have also entered the region with the Pakistani Government supporting their actions.<sup>72</sup> As a report from Georgetown University's Berkeley Center for Religion, Peace & World Affairs ("Berkeley Center") noted, "Jihadist groups like Jaish-e-Mohammed were a useful tool for the Pakistani Government: they effectively challenged Indian control of Kashmir, provoked harsh repressive measures from the Indian military, and allowed the regular Pakistani military to gain distance from frontline hostilities."<sup>73</sup> Moreover, tensions between India and Pakistan are particularly heated because they are both nuclear powers.<sup>74</sup>

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<sup>66</sup> Sudha Ramachandran, *Can Kashmir's Pandits Ever Return Home?*, The Diplomat (Feb. 26, 2020), <https://thediplomat.com/2020/02/can-kashmirs-pandits-ever-return-home/>.

<sup>67</sup> BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3, at 9.

<sup>68</sup> *Id.*

<sup>69</sup> *See Fair, supra* note 15.

<sup>70</sup> *See* BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3, at 9.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

India's security forces' response to the violence in Kashmir poses another significant layer of concern. India's responses to Pakistan-backed separatism has included killings, tortures, and disappearances.<sup>75</sup> These human rights violations are facilitated by law, as the Indian Armed Forces Special Powers Act (AFSPA) grants broad immunity to military personnel for human rights violations and additionally provides armed forces personnel with "special powers"<sup>76</sup> when operating in certain areas that must be classified as "disturbed."<sup>77</sup> Authorities have relied extensively on administrative detentions in the J&K region, with Amnesty International providing that, "[a]t its lowest, the percentage of administrative detainees (within the overall prison population) in J&K prisons was 11.5% (2008). This is over 14 times higher than the national average."<sup>78</sup> Additionally, the Public Safety Act ("PSA") violates several international human rights laws and standards, as Amnesty International provided:

The PSA violates international human rights law and standards by providing for detention without trial while denying the possibility of judicial review and other safeguards for those in detention required under international human rights law. It also violates the principle of legality by defining offences so broadly as to allow security officials to detain individuals on extremely vague

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<sup>75</sup> Meenakshi Ganguly, *India Needs to Step Back in Kashmir*, HUMAN RIGHTS WATCH (Aug. 12, 2019), <https://www.hrw.org/news/2019/08/12/india-needs-step-back-kashmir#>.

<sup>76</sup> The special powers concerned involve the right open fire if the officer is "of the opinion that it is necessary to do so for the maintenance of public order...", arrest without warrant with at least reasonable suspicion, and to enter and search without warrant to make an arrest or recover a person or property wrongfully restrained or stolen. *See* Armed Forces (Special Powers) Act, No. 28 of 1958, art. 4.

<sup>77</sup> The Act provides that an area may be disturbed if, "the Governor of Assam or the Chief Commissioner of Manipur is of the opinion that the whole or any part of the State of Assam or the Union Territory of Manipur, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil powers is necessary, he may, by notification in the Official Gazette, declare the whole or any part of the State or Union territory to be a disturbed area." *Id.* *See also* Amnesty International, *A 'Lawless Law,' Detentions under the Jammu and Kashmir Public Safety Act*, (March 2011), at 10.

<sup>78</sup> Amnesty International, *supra* note 77, at 12.

grounds including for exercising their rights to peaceful assembly and freedom of expression.<sup>79</sup>

Thus, the aforementioned history paints a picture of India-controlled Jammu and Kashmir up to the time of the writing of this article, notwithstanding Delhi's recent decision to abrogate Articles 370 and 35A.

## II. REMOVAL OF KASHMIR'S SPECIAL PROTECTION STATUS: ABROGATION OF ARTICLES 370 AND 35A OF THE INDIAN CONSTITUTION

In August of 2019, the Indian Parliament passed, with President Ram Nath Kovin\_'s signature, legislation to remove both Articles 370 and 35A of the Indian Constitution.<sup>80</sup> The rationale behind the move cited the "temporary" nature of the provisions, economic development, and gender discrimination to back the abrogation.<sup>81</sup> Immediately, the decision proved controversial, as law professor and scholar Ali L. Khan noted, "[b]y revoking Articles 370 and 35A, India has seemingly abandoned the notion of J&K state as a special territory deserving autonomy."<sup>82</sup> Protests and debates about the constitutionality of the decision ensued. Several petitions were filed challenging the constitutionality of the abrogation, but the Supreme Court has sided with the government, affirming the constitutionality of the abrogation.<sup>83</sup>

Whether the decision to remove Kashmir's special protection status was constitutional is up for debate. Those who find the decision to be constitutional often draw upon a 1961 Indian Supreme Court decision, *Puranlal Lakhanpal v. The President of India*, to justify their

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<sup>79</sup> *Id.* at 15.

<sup>80</sup> See Khan, *supra* note 48.

<sup>81</sup> *Full text of document on govt.'s rationale behind removal of special status to J&K*, THE HINDU (Aug. 5, 2019), <https://www.thehindu.com/news/national/full-text-of-document-on-govts-rationale-behind-removal-of-special-status-to-jk/article28821368.ece>.

<sup>82</sup> Khan, *supra* note 48.

<sup>83</sup> Murali Krishnan, *Article 370 matter stays with 5-judge bench, SC accepts govt's stand*, HINDUSTAN TIMES (Mar. 2, 2020), <https://www.hindustantimes.com/india-news/no-need-for-larger-bench-rules-supreme-court-on-plea-on-scrapping-article-370/story-OgFNM16BpwyvcQh5QswT7I.html>.

position.<sup>84</sup> There, the Indian Supreme Court held that the President of India may modify Constitutional provisions for its application to Kashmir.<sup>85</sup> On the other hand, others underscore that the case may not provide for the sweeping application of India's constitution to J&K altogether.<sup>86</sup> Those who maintain that the abrogation of J&K's special protection status was unconstitutional often rely upon the 1973 Indian Supreme Court decision, *Kesavananda Bharati v. State of Kerala*.<sup>87</sup> There, the Indian Supreme Court found that the basic structure and principles of the Indian Constitution were not amendable through any process.<sup>88</sup> Therefore, some contend that Articles 370 and 35A are basic structures and principles of the Indian Constitution, and are therefore not amendable, let alone entirely revocable.<sup>89</sup> In its response to petitions concerning the constitutionality of the decision, the Government of India focused on the fact that the provisions were always intended to be temporary.<sup>90</sup> Furthermore, the Government's affidavit in support of the abrogation provided, "[t]he militants and separatist elements, with the support of foreign forces inimical to India, were taking advantage of the situation and sowing discord, discontent, and even secessionist feelings among the populace of the State," and that, "[w]hat is more, the residents of the erstwhile state were also being denied all the benefits of the rights guaranteed by the Constitution of India to all other citizens of the country."<sup>91</sup> Thus, there are competing arguments

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<sup>84</sup> Krishnadas Rajagopal, *An Article on J&K*, THE HINDU (Aug. 9, 2018), <https://www.thehindu.com/opinion/op-ed/an-article-on-jk/article24636406.ece>.

<sup>85</sup> Puranlal Lakhanpal v. The President of India and Others, (1961) 1 SCR 688 (India).

<sup>86</sup> Press Trust of India, *Presidential order on Art 370 not in accordance with judicial process: Pb AG*, BUSINESS STANDARD (Aug. 5, 2019), [https://www.business-standard.com/article/pti-stories/presidential-order-on-art-370-not-in-accordance-with-judicial-process-pb-ag-119080501486\\_1.html](https://www.business-standard.com/article/pti-stories/presidential-order-on-art-370-not-in-accordance-with-judicial-process-pb-ag-119080501486_1.html).

<sup>87</sup> See V. Venkatesan, *Eight Cases That Will Test Whether 'Basic Structure Doctrine' Can Safeguard India's Democracy*, THE WIRE (Oct. 20, 2020), <https://thewire.in/law/eight-cases-that-will-test-whether-basic-structure-doctrine-can-safeguard-indias-democracy>; *Kesavananda Bharati v. the State of Kerala*, (1973) 4 SCC 225 (India).

<sup>88</sup> See *Kesavananda Bharati v. the State of Kerala*, (1973) 4 SCC 225 (India).

<sup>89</sup> See Venkatesan, *supra* note 87.

<sup>90</sup> *Centre justifies Article 370 decision in Supreme Court*, MINT (Nov. 11, 2019), <https://www.livemint.com/news/india/centre-justifies-article-370-decision-in-supreme-court-11573485747301.html>.

<sup>91</sup> *Id.*

on whether the abrogation of Articles 370 and 35AA was constitutional.

### III. DID THE ABROGATION OF ARTICLES 370 AND 35A VIOLATE INTERNATIONAL LAW?

Under international law, Kashmir's special protection status granted an additional degree of autonomy. The previous legal framework provided Kashmiris greater control over their own laws relating to property, ownership, and other local issues, as well as the ability to determine the qualifications for permanent residency.<sup>92</sup> This section will examine whether Kashmir has the right to enjoy this greater autonomy under general and customary international law. Specifically, this section will look to the international legal standards regarding autonomy regimes, minority rights, and the right to self-determination. Lastly, this section will balance Kashmir's right to self-determination with India's duty to protect under international law.

#### A. KASHMIRIS' RIGHT TO ENJOY AN AUTONOMY REGIME

Autonomy regimes are defined as "regions of a State, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part."<sup>93</sup> Autonomy, specifically, is defined as, "a device to allow ethnic or other groups that claim a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers that cover common interests."<sup>94</sup> Autonomy may be granted under a variety of legal arrangements, as there exists no uniformity with respect to the terms and legal structures of autonomy.<sup>95</sup> The creation of an autonomy regime is not derived from international law, but instead from the state's own constitution or

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<sup>92</sup> Aljazeera, *supra* note 51.

<sup>93</sup> Yoram Dinstein, *Autonomy Regimes in International Law*, 56 VILL. L. REV. 437, 437 (2011).

<sup>94</sup> YASH GHAI, *INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR* 484 (Paul C. Stern & Daniel Druckman eds., 2000).

<sup>95</sup> *Id.*



legislation.<sup>96</sup> Under general international law, there is generally no binding obligation for a state to create or to maintain an autonomy regime.<sup>97</sup> Therefore, if specific provisions of a constitution or legislation concerning the autonomy regime is breached, generally, remedies are sought through the relevant domestic legal system.<sup>98</sup>

One exception to this is when an autonomy regime is provided for under a bilateral treaty or a recommendation from an international organization.<sup>99</sup> However, there are often dramatic political consequences that follow the abolishment of autonomy regimes. "An attempt to abolish unilaterally an autonomy regime is bound to have grave political reverberations . . . but, legally speaking, if the foundation of the autonomy regime is solely domestic, the State is only required to observe the strictures of its own legal system as regards to constitutional or legislative amendments . . ."<sup>100</sup> Resultantly, because of the lack of general international legal standards surrounding autonomy regimes, Kashmir likely does not hold the right to an autonomy regime under general international law.

Additionally, Kashmir likely does not have the right to an autonomy regime under customary international law. There are several instances of autonomy regimes around the world. For example, Denmark created an autonomy regime for Greenland with the Home Rule Act of 1979, for which additional powers were granted to Greenland's local government 30 years after it was created.<sup>101</sup> However, customary international law does not necessitate an obligation to create or maintain autonomy regimes once the regime is established. For instance, China did not honor promises of autonomy to Tibet, and neither did Sudan to its southern province.<sup>102</sup> Moreover, once an autonomy regime is created, the international community is unlikely to intervene in the internal domestic affairs of the state.<sup>103</sup> However, Eritrea and Kosovo demonstrate that once a state grants an

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<sup>96</sup> Dinstein, *supra* note 93, at 438.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 439.

<sup>101</sup> Dinstein, *supra* note 93, at 446.

<sup>102</sup> Ghai, *supra* note 94, at 498.

<sup>103</sup> *Id.*

autonomy regime and revokes it unilaterally, the abolition often radicalizes the situation and increases the likelihood of secession.<sup>104</sup>

Thus, international law allows states to develop autonomy regimes, but international law does not provide that these autonomy regimes are irrevocable. Therefore, India did not breach any duty to maintain Kashmir's autonomy regime by removing its special protection status.

#### B. KASHMIRIS' RIGHT TO MINORITY PROTECTIONS

There is no international, unanimous definition of what constitutes a minority. Minority status is both a question of fact and encompasses objective and subjective factors.<sup>105</sup> Minorities may be differentiated by one or more observable human characteristic, such as ethnicity, race, religion, caste, gender, socioeconomic status, ableness, or sexual orientation.<sup>106</sup> Minority groups are often exposed to differential treatment within society, including discrimination based on perceived membership to the minority group.<sup>107</sup> Discrimination against minority groups may also occur indirectly, as a result of unequal societal structures.<sup>108</sup>

International law has set the foundations for minority groups' collective right to autonomy. Article 27 of UN International Covenant on Civil and Political Rights, ("ICCPR") states that, "[i]n those States in which ethnic religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other minorities of their group, to enjoy their own culture, or profess and practice their own religion, or to use their own language."<sup>109</sup> Scholar Rudiger Wolfrum interpreted this provision, noting that, "Article 27 has to be understood as providing a minimum

<sup>104</sup> Dinstein, *supra* note 93, at 446.

<sup>105</sup> *Minorities Under International Law*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/issues/minorities/pages/internationallaw.aspx>.

<sup>106</sup> Fatmeh Mihandoost & Bahman Babajanian, *The Rights of Minorities in International Law*, 9 J. POL. & LAW 15, 16 (2016).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> International Covenant on Civil and Political Rights ("ICCPR") art. 27, Dec. 16, 1966, S. TREATY DOC. NO. 95-20,, 999 U.N.T.S. 171 [hereinafter ICCPR].

of protection against enforced integration or assimilation.”<sup>110</sup> As scholar and professor Yoram Dinstein noted, “what contemporary international law rejects is the construct of an enforced national melting pot, which would deny protected minorities the right to be different from the majority of the population of the State in which they live.”<sup>111</sup>

On December 18, 1992, the UN General Assembly issued a declaration, on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities which provided that: “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”<sup>112</sup> The Declaration further highlights that: “Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a matter not incompatible with national legislation.”<sup>113</sup>

Regional law is additionally increasingly trending towards providing minority groups’ rights to autonomy. For instance, the Organization for Security and Co-operation in Europe’s (OSCE) Copenhagen Document, although not legally binding in itself, recognized that: “The participating States note the efforts taken to protect and create conditions for the promotion of ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve the aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.”<sup>114</sup> However, Dinstein noted on this provision, “[i]t is striking that the text does not even include a ‘clear recommendation to establish autonomy.’”<sup>115</sup> In

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<sup>110</sup> Dinstein, *supra* note 93, at 440.

<sup>111</sup> *Id.*

<sup>112</sup> G.A. Res. 47/135, art. 1 (Dec. 18, 1992).

<sup>113</sup> *Id.*

<sup>114</sup> ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE ¶ 35 (Jun. 29, 1990).

<sup>115</sup> Dinstein, *supra* note 93, at 442.

1993, the Parliamentary Assembly of the Council of Europe drafted a proposed protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms on the rights of national minorities, where Article 11 provided:

[I]n the regions where they are in a majority the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state.<sup>116</sup>

However, this protocol was ultimately not adopted. Thus, although there is a growing trend towards recognizing that minorities have autonomy rights under international law, this right is still developing and not well-established.

It is unlikely that Kashmiris hold minority status under international law. Historically, Kashmir was not separate from the remainder of the Indian subcontinent, and during British rule, it was treated as one of the princely states, similar to several current states of India. The primary distinguishing factor of Kashmir is its majority-Muslim population—the only majority-Muslim population in India, aside from union territory, Lakshadweep. Because of Kashmir's semi-autonomous status within India prior to 2019, one could argue that Muslims were not a minority for legal purposes. Ironically, by abrogating Articles 370 and 35A, the Indian government has enabled the Kashmiri Muslim community to more easily claim minority status. However, although Kashmiri Muslims may be minorities under international law by virtue of being a Muslim community in Hindu-majority India, the protections for minorities are likely not strong enough under international law to provide them with special protection status.

### C. KASHMIRIS' RIGHT TO SELF-DETERMINATION

The right to self-determination is well-established under international human rights law. The right to self-determination is presented in Article 1 of the UN Charter, enacted in 1945, which

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<sup>116</sup> COUNCIL OF EUROPE, AN ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON NATIONAL MINORITIES, art. 11, (Jan. 19, 1993), <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6772&lang=EN>.

provides that: "The Purposes of the United Nations are . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . ." <sup>117</sup> The right to self-determination is also enshrined in the ICCPR: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." <sup>118</sup> Additionally, the International Covenant on Economic, Social and Cultural Rights ("ICESCR") states in Article 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." <sup>119</sup> Some international jurists have even argued that the right to self-determination is so intrinsic to international human rights that it should be *jus cogens*. <sup>120</sup>

There are two kinds of self-determination recognized under international law: internal self-determination and external self-determination. External self-determination is a right which, "concerns the international status of a people," specifically, "the recognition that each people has the right to constitute itself a nation-state or to integrate into or federate with, an existing state." <sup>121</sup> In international law, it is traditionally accepted that the external right to self-determination only applies to circumstances in which a people is oppressed or the "mother state's government does not legitimately represent the people's interests . . . ." <sup>122</sup> In contrast, internal self-determination, "means only that the states should not, through appeals or pressure, seek to prevent people from freely selecting its own political, economic, and social system." <sup>123</sup> With respect to self-determination of minorities, Max van der Stoep stated that because

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<sup>117</sup> U.N. Charter art. 1, ¶ 2.

<sup>118</sup> ICCPR, *supra* note 109.

<sup>119</sup> International Covenant on Economic, Social, and Cultural Rights ("ICESCR") art. 1, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>120</sup> See Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. No. 169, at 6 (Feb. 25).

<sup>121</sup> Salvatore Senese, *External and Internal Self-Determination*, 16 SOC. JUST. 19, 19 (1989).

<sup>122</sup> Milena Sterio, *Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia*, 22 AM. SOC. INT'L L. (2018).

<sup>123</sup> Senese, *supra* note 121, at 19.

external self-determination to minority groups in the world would prompt the creation of around 2,000 independent states, greater emphasis should instead be placed on internal self-determination to ensure that national minorities express their full identity and are able to live free and “achieve their aims, especially in the cultural and educational fields.”<sup>124</sup>

It is doubtful that Delhi's abrogation of Articles 370 and 35A violated Kashmir's right to external self-determination under international law. The matter of external self-determination only applies if it is determined that the current population is oppressed.<sup>125</sup> This is a debatable position, especially because the abrogation integrates Kashmir with the remainder of India, so that the Indian Constitution applies to Kashmir like other Indian states and union territories.<sup>126</sup> However, it is possible that Kashmiris' right to internal self-determination may be violated under international law, as it is possible that the Muslim majority in Kashmir will be diluted, and India's political power will be consolidated in the region.<sup>127</sup> Moreover, now as a union territory, Kashmir is directly governed by the Central Government, without its own separate governing body.<sup>128</sup> Thus, the

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<sup>124</sup> Kalana Senartne, *Internal Self-Determination in International Law: A Critical Third-World Perspective*, 3 *ASIAN J. OF INT'L L.* 305 (citing High Commissioner on National Minorities: Speech by Max van der Stoep, OSCE, <http://www.osce.org/hcnm/37259> (May 13, 1994)).

<sup>125</sup> *Id.*

<sup>126</sup> Sikander Shah, *An In-Depth Analysis of the Evolution of Self-Determination under International Law and the Ensuing Impact on the Kashmiri Freedom Struggle, Past and Present*, 34 *N. Ky. L. Rev.* 29 (2007).

<sup>127</sup> See Ahmed Farooq, *Kashmir Dispute Redux: What of the Right to Self-Determination?*, *FORDHAM INT'L L. J. BLOG*, <https://www.fordhamilj.org/iljonline/2019/9/10/kashmir-dispute-redux-what-of-the-right-of-self-determination>.

<sup>128</sup> This Home Minister promised that the Union Territory status is temporary and will eventually return to statehood. *What is the Difference Between a State and a Union Territory?*, *INDIA TODAY* (Aug. 6, 2019), <https://www.indiatoday.in/education-today/gk-current-affairs/story/what-is-the-difference-between-a-state-and-an-union-territory-1577445-2019-08-05>; Krzysztof Iwanek, *Ladakh, Jammu and Kashmir Are India's Newest Union Territories. What Does that Mean in Practice?*, *THE DIPLOMAT* (April 15, 2020), <https://thediplomat.com/2020/04/what-exactly-does-union-territory-status-in-the-republic-of-india-mean/>.

internal but not external right to self-determination may be implicated when India removed Kashmir's special protection status.<sup>129</sup>

D. BALANCING KASHMIR'S RIGHT TO INTERNAL SELF-  
DETERMINATION WITH INDIA'S SECURITY RIGHTS AND DUTY TO  
PROTECT

If India breached Kashmir's right to internal self-determination, this violation must be balanced with India's duty to protect under international law, also known as humanitarian intervention. The responsibility to protect endows states with great discretion to take measures that might otherwise violate international legal standards. As the UN Office on Genocide Prevention and the Responsibility to Protect stated, "the responsibility to protect embodies a political commitment to end the worst forms of violence and persecution."<sup>130</sup> Additionally, the UN has stipulated that, "the duty to prevent and halt genocide and mass atrocities lies first and foremost with the State, but the international community has a role that cannot be blocked by the invocation of sovereignty."<sup>131</sup>

The responsibility to protect has been affirmed in various international human rights documents, but it is a relatively recent concept. The 2005 World Outcome stipulated that, "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity...the international community also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means...to help to protect populations from genocide, war crimes, ethnic cleansing and

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<sup>129</sup> See Akhilesh Pillalamarri, Long Overdue: Why Ladakh's New Status in India Should Be Welcomed, *THE DIPLOMAT* (Aug. 8, 2019), <https://thediplomat.com/2019/08/long-overdue-why-ladakhs-new-status-in-india-should-be-welcomed/>. Self-determination applies differently to different groups within Kashmir, which complicates the issue further.

<sup>130</sup> UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, *Responsibility to Protect*, <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml>.

<sup>131</sup> UNITED NATIONS, PEACE AND SECURITY, <https://www.un.org/en/sections/issues-depth/peace-and-security/>.

crimes against humanity.”<sup>132</sup> UN Secretary-General Ban Ki-moon’s 2009 report, *Implementing the Responsibility to Protect*, which helps to operationalize the term, “responsibility to protect,” provides that the responsibility solely applies to four types of crimes and violations: genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>133</sup> Ban Ki-moon’s report from 2012, *Responsibility to protect – timely and decisive response*, stipulated that “[t]he essence of ‘responsibility while protecting’ is doing the right thing, in the right place, at the right time and for the right reasons. Timely and decisive action puts a premium on assessment, on understanding what is happening, why it is happening, and how the international community can help keep a difficult situation from becoming worse.”<sup>134</sup>

Most relevant to the current Kashmir query is a series of measures that states can take in order to prevent atrocity crimes. The Secretary General’s report of 2013, *Responsibility to protect: State responsibility and prevention*, provided that “[c]onstitutional protections, when upheld, can contribute to creating a society based on non-discrimination.”<sup>135</sup> Moreover, the report provided that “the diffusion and sharing of power can engender political pluralism, which promotes the peaceful coexistence of different interests.”<sup>136</sup> The report also highlighted that atrocity crimes are more likely to take place during an armed conflict, and also established that societies with patterns of discrimination are risk factors, “[p]ersistent discrimination establishes divisions within society that serve both as a material cause and as a perceived justification of group violence. Without group-level discrimination, even deep-seated grievances are unlikely to transform into patterns of abuse that give rise to atrocity crimes.”<sup>137</sup>

<sup>132</sup> G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 136 (Sept. 16, 2005).

<sup>133</sup> U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 10(b), U.N. Doc. A/63/677 (Jan. 12, 2009).

<sup>134</sup> U.N. Secretary-General, *Further Measures for Restructuring and Revitalization of the United Nations in the Economic, Social and Related Fields*, U.N. Doc. A/RES/50/227 (July 1, 1996).

<sup>135</sup> U.N. Secretary-General, *Responsibility to Protect: State Responsibility and Prevention*, ¶ 35, U.N. Doc. A/67/929 (July 9, 2013).

<sup>136</sup> *Id.* at ¶ 39.

<sup>137</sup> *Id.* at ¶ 20.



The 2013 report also explained the role of gender discrimination in atrocity crimes, establishing that

[g]ender discrimination and inequality increase underlying risks associated with sexual and gender-based violence, which can constitute genocide, war crimes and crimes against humanity in some circumstances. Specific gender discrimination practices include the denial or inadequate protection of basic rights relating to physical security and the status of women, compulsory birth control, and access to services and property.<sup>138</sup>

The report further provided that

the risk of atrocity crimes is often connected to the presence of armed groups or militia and their capacity to commit atrocity crimes. Armed groups or militia may be allied with the State or a particular population sector. Associated risks include the proliferation of arms, including small arms, and the ability of armed groups to support their operations financially . . . .<sup>139</sup>

Interestingly, all the aforementioned risk factors of armed conflict,<sup>140</sup> gender-based discrimination,<sup>141</sup> and armed groups allied with a particular population sector<sup>142</sup> are present in the Kashmir predicament.

Thus, one could argue that the level of conflict and discrimination present in the Kashmir region enabled India to revoke Kashmir's special protection status, despite the potential breach of Kashmir's right to self-determination. India may specifically argue that abrogating Articles 370 and 35A was an internationally lawful act because the risk of atrocity was high enough to justify taking

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<sup>138</sup> *Id.* at ¶ 19.

<sup>139</sup> *Id.* at ¶ 22.

<sup>140</sup> BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3, at 9.

<sup>141</sup> Khullar, *supra* note 55.

<sup>142</sup> BERKELEY CTR. FOR RELIGION, PEACE & WORLD AFFS., *supra* note 3, at 11.

constitutional measures to ensure peace and security in the region.<sup>143</sup> Because states are afforded ample discretion when acting under the duty to protect, it is likely that such arguments would pass muster under international law.

#### IV. CONCLUSION

The removal of Kashmir's special protection status was likely an internationally lawful act. Kashmir's special protection status essentially granted Kashmiris an autonomy regime. This article therefore examined three distinct theories: (1) the right to autonomy within an autonomy regime; (2) the right to autonomy under minority protections; and (3) the right to autonomy under self-determination. Lastly, this article balanced a potential breach of Kashmir's self-determination with India's duty to protect and ensure peace and security. This article concludes that although rights to autonomy regimes, and minority rights more broadly, are developing under international law, they are currently too weak to provide Kashmir with irrevocable special protection status. The article additionally found that while India likely did not breach Kashmiris' right to external self-determination, it is possible that India's actions will result in a violation of Kashmiris' right to internal self-determination. Even so, it is unlikely that such a claim could succeed under international law, as India has great discretion under which to act within its duty to protect.

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<sup>143</sup> *See id.*